Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-654

FRANK J. MERLINO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979

NO.

FRANK J. MERLINO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Frank J. Merlino, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on May 22, 1979.

OPINIONS BELOW

This case is reported at 595 F.2d 1016 (5 Cir. 1979). A copy of the Opinion is incorporated in the Appendix to this Petition (App., p. A-1).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 22, 1979 (App., p. A-11). A timely petition for rehearing was denied (App., p. A-12). Subsequently, the Fifth Circuit entered an order allowing leave to the petitioner to file a second petition for rehearing and leave to file rehearing en banc (due to an apparent conflict in the Circuit's decisions) (App., p. A-14). The second petition for rehearing en banc was denied September 21, 1979 (App., p. A-15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I

Whether the Supreme Court should exercise its supervisory powers over the Federal courts to dismiss the indictment or order a new trial where the prosecutor (i) used a post-indictment grand jury to discover defense stratagem and prepare for trial; (ii) made false representations to the trial court that said grand jury was not used for any discovery and that no Brady material existed; (iii) withheld Brady and Giglio materials to throw the defendant off-balance; (iv) withheld one of the key witness' testimony before the indicting grand jury in violation of the Jencks Act and numerous trial orders.

II

Whether the Due Process clause of the Fifth Amendment will tolerate the prosecutorial

misconduct consisting of the acts described in Question 1, Items (i)-(iv).

III

Whether the defendant was deprived of his Sixth Amendment right to effective assistance of counsel where the government used a post-indictment grand jury to compel defendant's witnesses to disclose defense strategy and to prepare for trial.

IV

Where one panel of a circuit grants a new trial and another panel of the same circuit states it cannot grant a new trial when the defendant in each case declines an invitation to move for a mistrial but instead seeks dismissal of the indictment based on governmental misconduct (which constitutes a denial of Due Process or requires the Court to exercise its supervisory power) the Supreme Court should review based on the intra-circuit conflict and the importance of the issues or remand for a rehearing *En Banc* pursuant to Rule 35, Federal Rules of Appellate Procedure.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Amendment VI:

> In All criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATUTORY PROVISIONS INVOLVED

18 USC §3500(b):

> "After a witness called by the United States has testified on direct examination, the court shall on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified . . ."
>
> "(e) The term 'statement' . . . means - -
>
> * * * * *
>
> "(3) A statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

21 USC §841(a):

> ". . . [I]t shall be unlawful for any person knowingly or intentionally -
>
> "(1) to . . . distribute . . . or possess with intent to . . . distribute . . . a controlled substance. . . "

FEDERAL RULE OF APPELLATE PROCEDURE INVOLVED

Rule 35:

> "(a) When Hearing or Rehearing in Banc Will Be Ordered. A majority of the circuit judges . . . may order . . . [a] proceeding be . . . reheard by the court of appeals in banc. Such . . . rehearing

> . . . ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions . . . "

STATEMENT OF THE CASE

This case involves the usual violations as to *Brady, Giglio,* and *Jencks* material by the prosecutorial arm of the United States government. Here, however, the prosecutor's zeal in the interminable and "anything goes" war against the alleged drug violator exceeded permissible limits. Prosecutorial misconduct is commonplace and will continue unless this Court exercises its judicial role as supervisor over the Federal Courts.[1]

Petitioner was charged with possession with intent to distribute and with distribution of 223.6 grams of cocaine, contrary to 21 USC §841(a)(1).

"Gross; improper use" of Grand Jury

The Fifth Circuit's decision reflects that after the petitioner was indicted the government subpoenaed a substantial number of witnesses to appear before a grand jury, which witnesses had been subpoenaed by the petitioner to testify at trial. The Fifth Circuit concedes that during the course of the

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1. In the instant case, the United States Attorney for the Southern District of Florida was "invited" to the oral argument. He was asked whether the government attorneys would comply with the standing pre-trial discovery order in all criminal cases in his District.

grand jury proceedings one witness was asked by the [assistant] United States Attorney whether he had been interviewed by petitioner's counsel of record, and if so, what did he discuss with him. [2]

To compound the misuse of the grand jury, the prosecutor orally misrepresented to the trial court that the grand jury was not used for any discovery (R154, 155).[3]

In a written response opposing petitioner's motion to produce the post-indictment grand jury testimony, the govern-

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2. From this post-indictment grand jury witness, the prosecutor ascertained that defense counsel's primary interest was the nature of the deal made with a paid government informant, Daniel Cacy, to get somebody arrested for the sale of cocaine (R 367, 371, 372). Armed with this information, the prosecutor was able to discover from a former state prosecutor, at the same grand jury, who nolle prossed three marijuana charges against Cacy that the nolle prosequi statement contained an entry that Cacy had assisted the "Feds" in a $700,000 cocaine buy in exchange for the case being dropped (R 375). Confronted with this highly favorable Giglio material, the prosecutor then advised the former assistant state attorney what he was "looking for" (R 368, 377). With the answers he was looking for from the state prosecutor, the federal prosecutor later used those answers effectively at trial to the prejudice of the petitioner as will be shown, *infra*.

3. Reference to Volumes I and II of the record-on-appeal containing the pleadings, orders, transcripts of certain pretrial hearings, etc., will be by the use of the symbol "R".

ment misrepresented to the district court as follows:

> ". . . the government can only respond that the Grand Jury was not used in the furtherance of any discovery and there was no misuse of the Grand Jury." (R 277)

The district judge found that the grand jury was improperly used to prepare a pending indictment for trial (R 284). As noted by the Fifth Circuit, the magistrate found that the government used the (post-indictment) grand jury to discover testimony of witnesses subpoenaed by the defendant.

The Fifth Circuit commented that the district judge (during the trial) described the incident of the prosecutor questioning one of the defendant's witnesses before the grand jury, on his conversations with defense counsel, as follows:

"Well, that's pretty gross. That's pretty gross; improper use."

Although the decision sought to be reviewed include the magistrate's finding that certain responses from the prosecutor's office were "false", the Fifth Circuit indicated that the prosecutor had been relying on statements made to him by other law enforcement officers which had been patently false.

Omitted from the decision is the finding of the magistrate after numerous appearances and filing of responses by the prosecutor that the latter has "made repeated representations to

the Court that have been false in this case . . ." (2 SR 21).[4]

Space limitations do not permit setting forth all of the governmental misrepresentations or a detailing of all the *Brady, Giglio* and *Jencks* material that was deliberately withheld by the government.[5]

Purposeful Brady Violations

One flagrant instance of deception by the government as to the existence of *Brady* material, and described in a magistrate's order as "not . . . praiseworthy", was the representation that petitioner was not mentioned on certain telephone tapes of one Dan Cacy, a paid government informant (R 87, 88, 155, 193).

A flagrant instance of prosecutorial supression was the failure of the government to give special agent, Fernandez' two-page report containing exculpatory evidence to the petitioner (T 642-647, 651-652).[6] The district court found the first page

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4. Reference to the Second Supplement to the record-on-appeal will be by the use of the sumbol "2 SR".

5. In this respect the Fifth Circuit stated that the record discloses that there was some Brady material and some Jencks material withheld by the government until long after it should have been given to the defendant.

6. Reference to the transcript of the trial proceedings contained in Volumes III and IV of the record-on-appeal will be by the use of the symbol "T".

to be helpful to the defendant where the agent attempted to get petitioner into a drug deal, and the petitioner indicated he was not interested (T 642-647, 651, 652). The prosecutor told the court that he could not give an answer as to why Fernandiz' report was not furnished to the petitioner (T 651).

Giglio Violations

The prosecutor suppressed the fact that Cacy was led to believe that for his cooperation the government would not prosecute him for bringing 1,400 pounds of marijuana to Miami (T 477, 478). Also, the prosecutor, after misusing the post-indictment grand jury, did not advise the petitioner that the nolle prosequi statement on Cacy had an entry that the latter had assisted the "Feds" in a $700,000 cocaine buy in exchange for his cases being dropped (R 375).

The Jencks Violation

At first the government represented to the district judge that it had no record of Agent Fernandez testifying before the grand jury (T 614-618, 675, 682, 945-948). When confronted with the fact of Fernandez testifying before the grand jury the government stated that it was unable to find any transcript of the testimony.

On appeal the government contended that it did not have to produce that which it did not have in its possession (the untranscribed shorthand notes) which the Fifth Circuit described as "nothing short of ridiculous". As soon as the

government realized a reversal was imminent if Fernandez' testimony before the grand jury was not transcribed and produced, the government (after disobeying pre-trial and trial orders to produce the transcript) suddenly delivered the transcript to the Fifth Circuit approximately ten days prior to oral argument.

From all of the foregoing, the trial judge's finding ". . . the defense has well had the problem of not having the full information necessary to prepare its case and conduct its trial . . . " is an understatement (T 665, 666).

In any event, the trial judge placed the petitioner in his own words "between a rock and a hard place" by stating the petitioner could ask for a mistrial but would not indicate that he was going to grant one (T 665, 666).

The Fifth Circuit seized upon petitioner's election not to ask for a mistrial, and instead to stand on his motion for dismissal of the indictment, as precluding petitioner from the alternative of a grant of a new trial.

Subsequent to the Merlino decision the Fifth Circuit in the case of *United States v. Hammond*, 598 F.2d 1008 (5 Cir. 1979), held (according to Judge Vance's dissent) in a "non-narcotics" case that a defendant can be entitled to a new trial based on governmental misconduct when he declines an invitation to move for a mistrial and elects to stand on his motion to dismiss the indictment.

Based on the apparent intra-circuit conflict, the Fifth Circuit granted leave to petitioner to file a second petition for rehearing and rehearing in banc and thereafter denied same (App., p. A-15).

REASONS FOR GRANTING THE WRIT

> This Court should exercise its suprevisory powers to dismiss the indictment or grant a new trial where justice is perverted by government prosecutors misusing a grand jury, lying to cover up this misconduct and misrepresenting that *Brady*, *Giglio* and *Jencks* material did not exist as well as suppressing same.

This Court stated in *McNabb v. United States*, 318 U.S. 332, 339-400, 63 S.Ct. 608, 87 L.Ed. 819 (1943), as follows:

> "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

Supervisory power over the administration of justice should be invoked to dismiss an indictment or grant a new trial where the prosecution's intolerable misconduct has permeated the proceedings. See *United States v. Butler*, 567 F.2d 885 (9th Cir. 1978) (concurring opinion); *United States v. Banks*, 383

F.Supp. 389, 392 (S.Dak., 1974); cf., *Communist Party of the United States v. Subversive Activities Control Board,* 351 U.S. 115, 124, 76 S.Ct. 663, 668, 100 L.Ed. 1003 (1955); *United States v. Payner,* 434 F.Supp. 113 (U.S., N.D. Ohio, E.D. 1977). [7]

The government, and particularly the United States Attorney's Office, is charged not only with the duty to prosecute the accused, but also with the paramount duty to ensure that justice is done. *United States v. Reynolds,* 345 U.S. 1, 12, 73 S.Ct. 528, 97 L.Ed. 727 (1952); *Berger v. United States,* 295 U.S. 78-88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934).

Here, the federal prosecutor used ("innocently") during pre-trial proceedings "patently false " statements of law enforcement officers to thwart the process of the court (595 F.2d 1017).

Here, the prosecutor falsely represented to the court that the post-indictment grand jury was not used for discovery (R 154-156).

Here, the prosecutor went further by falsely responding, in opposition to a defense motion seeking the post-indictment grand jury testimony, that the grand jury was not used in furtherance of any discovery and that there was no misuse of the grand jury (R 277).

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7. This court has granted review in *United States v. Payner, supra.*

Here, the prosecutor subpoenaed defendant's witnesses to ascertain what defense counsel was seeking and to prepare for trial (595 F.2d 1018; R 367, 368, 371, 372, 375, 377).

Here, there were repeated *Brady, Giglio* and *Jencks* violations both before and during trial as illustrated in the Statement of the Case, *supra,* which kept the defense "off balance" (595 F.2d 1018).

Here, the tragedy is the degree to which the government carried its offensive conduct and the district court turned its head. Then, in turn, the Fifth Circuit turned away from the obvious, egregious prosecutorial misconduct by holding a motion for mistrial should have been made by the petitioner.

If the Court cannot see the importance of exercising its supervisory powers to substantially upgrade the prosecutor's role in federal criminal proceedings, the Court will, in effect, be declaring that in the administration of criminal justice the end justifies the means.

II

Review must be granted for due process will not tolerate the perversion of justice by government prosecutors misusing a grand jury, lying to cover up this misconduct and misrepresenting that *Brady, Giglio* and *Jencks* material did not exist as well as suppressing same.

Again, as stated under Point I, the government, and particularly the United States Attorney's office, is charged not only with the duty to prosecute the accused, but also with the paramount duty to ensure that justice is done. *United States v. Reynolds, supra; Berger v. United States, supra.*

No citation of authority is necessary to support the principle long recognized by this Court that all criminal prosecutions must meet the bare minimum standards of Due Process of Law.

Quite simply, the prosecutorial misconduct depicted in the Statement of the Case (although helpful to gain a conviction) obviously shocks the conscience and is so outrageous that due process principles should bar conviction or compel the granting of a new trial. Cf., *Rochin v. California*, 342 U.S. 165, 169-174, 72 S.Ct. 205, 96 L.Ed. 908 (1964); *United States v. Russell*, 411 U.S. 423, 431, 432, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976).

Although *Rochin, Russel* and *Hampton* delt with police misconduct, it is submitted the Court should determine that the degree and type of misconduct to offend due process concepts would be even less where prosecutorial misconduct is involved. See *United States v. Reynolds, supra; Berger v. United States, supra.*

Further, the prosecutorial misconduct hampered petitioner's counsel by throwing his counsel "off balance" through the suppression of *Brady, Giglio* and *Jencks* material. (595 F.2d 1018).

Actual prejudice resulted to the petitioner from the prosecutor misusing the post-indictment grand jury to determine the petitioner's strategy by asking one of petitioner's subpoenaed witnesses what he discussed with petitioner's defense counsel. [8] Then, after determining that defense counsel's primary interest was the substance of the deal made with the paid informant, Cacy, the federal prosecutor interrogated petitioner's subpoenaed key witness on the Cacy deal before the same grand jury.

Thereafter, during cross-examination at trial, the federal prosecutor, supplied with the answers he told this latter witness he was "looking for" during the illicit grand jury interrogation, had no difficulty in eliciting the the "desired" answers from the witness (R 375-377). These answers diluted to petitioner's prejudice the importance of Cacy's work for the DEA, and that agency's help in assisting the informant, an oft-convicted felon, to be discharged from three state felony offenses in Florida (T 905-908).

Accordingly, the egregious conduct of the prosecutor, permeating both the pretrial and trial proceedings should be subject to appropriate correction by the Court via the Due Process Clause (or use of the Court's supervisory powers).

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8. See fn. 2, *supra.*

III

> Petitioner was deprived of his Sixth Amendment Right to effective assistance of counsel where the government improperly used a post-indictment grand jury to compel defendant's witnesses to disclose defense strategy and to prepare for trial.

This Court in *Hoffa v. United States,* 385 U.S. 293, 306-308, 17 L.Ed.2d 374, 87 S.Ct. 408, has recognized the proposition that a surreptitious invasion by government agents into the legal camp of the defense may violate the protection of the Sixth Amendment as expressed in *Caldwell v. United States,* 92 App. DC 355, 205, F.2d 879 and *Coplon v. United States,* 89 App DC 103, 191 F.2d 749.

The misuse of a post-indictment grand jury by a federal prosecutor to subpoena petitioner's witnesses for the purpose of ascertaining defense strategy and to prepare for trial constitutes a gross intrusion upon the petitioner's right to effective assistance of counsel under the Sixth Amendment, for the intrusion is committed under color of governmental authority.

By this governmental misconduct, the prosecutor was able to ascertain as indicated in Point II, *supra,* the petitioner's stratagem in regard to a paid government informant, who was to testify against petitioner.

Armed with the knowledge that the petitioner's strategy would be to concentrate on the credibility of Cacy as to the

type of deal made for his work for the DEA, the prosecutor interrogated another witness (a former state prosecutor), before the same post-indictment grand jury and stated to this witness "my question is more - - let me explain what I am looking for." (R 368, 377).

From the answers elicited, the federal prosecutor was able to cross-examine the state prosecutor during trial and to elicit the favorable portions of his grand jury testimony (T 905-908). [9]

Where there is a Sixth Amendment violation of a defendant's right to effective assistance of counsel, the remedy should be dismissal of the indictment or at the least, the granting of a new trial. Furthermore, it is unnecessary to find any prejudice where the Sixth Amendment right to effective assistance of counsel is violated, for as held by this Court in *Glasser v. United States,* 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942):

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

This Court should review the Sixth Amendment violation

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9. The Sixth Amendment violation by the government was further compounded by the prosecutor stating to the jury in final argument that there wasn't any real help to Cacy by the DEA on the State felony charges (T 971).

by the government through its wilful and knowing invasion of the attorney-client relationship by misuse of a grand jury. It was ably stated in *United States v. Levy*, 577 F.2d 200 (3rd Cir. 1978):

> " . . . [W]here confidential information is disclosed to the government, we think, that there are overwhelming considerations militating against the standard which test the sixth amendment violation by weighing how prejudicial to the defense the disclosure is . . . [I]t is highly unlikely that a court can, in such a hearing, arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government in its further investigation of the case, in the settled process of pretrial discussion with potential witnesses, in the selection of jurors or in the dynamics of trial itself."

It cannot be contradicted that the prosecutor's "gross; improper use" of the grand jury to ascertain defense strategy and to prepare for trial violated petitioner's Sixth Amendment right to effective assistance of counsel.

IV

> This Court should review based on the intra-circuit conflict and the importance of the issue, or remand for a rehearing en banc pursuant to Rule 35, Federal Rules of Appellate Procedure, where the panel in the case, *sub judice*, is in direct conflict with another panel on the issue of whether a defendant who declines an invitation to move for a mistrial but instead seeks dismissal of an indictment based on governmental misconduct can be entitled to the grant of a new trial.

In the case, *sub judice*, a drug case, the Fifth Circuit held that notwithstanding all of the occurrences of prosecutorial misconduct, inasmuch as the petitioner did not move for a mistrial when invited to by the trial court, and instead stood on his motion for a dismissal of the indictment, the appellate court has no alternative to grant a new trial. [10]

In a non-drug case, *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979), another panel of the Fifth Circuit directly collided with the *Merlino* decision (as evidenced in the dissenting opinion) by holding a new trial may be granted based on governmental misconduct amounting to a denial of due process notwithstanding that the defendant declined an invitation to move for a mistrial and urged, instead, that the government's misconduct warranted a dismissal of the indictment.

Obviously, the two cases collide and this Court should decide the important question of federal law, not as yet settled by this Court as to whether or not a defendant must move for a mistrial where prosecutorial misconduct pollutes the judicial proceedings in order to be entitled to a new and fair trial.

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10. Actually, the trial judge did not indicate if he would grant a mistrial (T 666). Following his conviction, the petitioner moved for a new trial based on prosecutorial misconduct, which motion was denied (R 447).

If the cirminal justice system is to survive serious and repeated acts of governmental misconduct, the federal courts should not place themselves in a judicial straight jacket by leaving no alternative except a dismissal of an indictment as was done in the case, *sub judice.*

In the event this Court does not grant review by way of certiorari, it is respectfully submitted that the case be remanded for an en banc hearing to compel the Fifth Circuit to comply with Rule 35 of the Federal Rules of Appellate Procedure in order that the court maintain uniformity of its decisions.

CONCLUSION

Based upon the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the United States Attorney's Office, 300 Ainsley Building, Miami, Florida, this 19th day of October, 1979.

_____
RICHARD M. GALE

APPENDIX A

OPINION OF THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5708

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANK J. MERLINO,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(MAY 22, 1979)

Before BROWN, Chief Judge, TUTTLE and THORNBERRY, Circuit Judges.

TUTTLE, Circuit Judge:

This appeal from a conviction on one count of possession of a controlled substance with intent to distribute and on another count for distribution of a controlled substance in vio-

lation of 21 U.S.C. § 841(a)(1) urges primarily prosecutorial misconduct as a basis for reversing. It also attacks consecutive sentences where it is alleged that the one act of distribution of a controlled substance will also support a sentence of possession with intent to distribute. Other errors are alleged which are of less importance in our consideration of the appeal.

I. STATEMENT OF THE CASE

There was ample evidence given by Agent Fernandez of the United States Drug Enforcement Administration from which the jury could readily find beyond a reasonable doubt that after some preliminary negotiations, Merlino delivered 223.6 grams of cocaine of 42.7 percent purity to Fernandez for $8,000. The testimony be Fernandez was supported by one Daniel Cacy, an unsavory character who, the jury could find, had originally tipped off the DEA to the possibility of making a case against Merlino in order to pay off for the state's dismissing a pending narcotics case against him in the state court. There can be no doubt but that the jury would have been hard put to it to believe anything testified to by Cacy if it had not been for the corroborating evidence of Fernandez and Surrounding circumstances.

The jury believed the government's witnesses and found Merlino guilty on both counts. It is clear that the only possession which the jury could find was the one act of possession which occured at the moment of sale to Fernandez.

II. PROSECUTORIAL MISCONDUCT

[1] Before, during, and after the trial, the defendant's

counsel filed no less than seven motions for dismissal of the indictment based on alleged prosecutorial misconduct. The appellant characterizes the failure of the prosecutor's office to produce certain *Brady* [1] material in response to an outstanding pre-trial order as "outrageous," "deceitful," "deliberate," "misleading" and highly prejudicial. Appellant uses the same pejorative allegations in his brief in this court, stating that such conduct, together with an alleged use of a grand jury proceedings for pre-trial preparation of its case, was so "outrageous" as to require the court in its supervisory capacity to dismiss the indictment. In this respect, the appellant is in the position of asking for a dismissal with no alternative of the grant of a new trial, because after substantially all of the occurrences of which he now complains, the trial court expressly placed upon the defendant a burden of deciding whether he wished to move for a mistrial. The defendant elected not to do so, standing on his motion for a dismissal of the indictment.

The record discloses that there was some *Brady* material and some *Jencks* material withheld by the government, until long after it should have been given to the defendant. As to this, the magistrate, who recommended that a motion for dismissal of the indictment be denied did find that certain responses from the prosecutor's office were "false." In this connection, the magistrate said during the hearing:

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1. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.ED 2d 215 (1963).

THE COURT: I realize that may not be your fault. I don't want to hear of the Government having done anything to thwart the process of the court. On the contrary, I want to know what the Government is doing, whether it is doing all in its power to assist the court in having its process honored. I don't know what more obligation we can do at this stage.

I am satisfied at this point, Mr. Pave, that you have not yourself, or anyone that you are aware of, thwarted the process. I am also concerned, however, that in the past in this case you have relied on statements made to you by other law enforcement officers, which had been patently false. You filed responses in this case stating there was no information favorable to Mr. Merlino concerning the *in camera* material. That was not true.

However, the magistrate exculpated the trial counsel by stating:

> I am satisfied that you didn't know that it was not true when you said it, but the point is that you have relied on some misrepresentations by other law enforcement officers that were not reliable, and I want to caution you and place upon you the burden to do some independent investigation, if it becomes necessary, in a given context and not to make representation based on what other people have told you. This is what I am telling you.

In her report to the court the magistrate said:

> Although the conduct of the government in its representations to the court concerning the nature of material ultimately examined *in camera* and required to be disclosed in this case has not been praiseworthy, it does not require dismissal of this indictment.

The trial court adopted the report and order of the magistrate.

Another basis for the appellant's charge of prosecutorial misconduct is the fact that after Merlino's indictment, and before trial, a substantial number of the witnesses who had been subpoenaed by the defendant to testify at the trial were subsequently subpoenaed by the government to appeal before a grand jury. It developed that during the course of the grand jury proceedings, one of the witnesses was asked by the U.S. attorney whether he had interviewed Mr. Masin (defendant's counsel of record) and if so, what did he discuss with him. As to this, the magistrate commented that: "There is every reason to believe that the government improperly used the grand jury of this court to discover testimony of witnesses subpoenaed by the defendant." Further, speaking to the questioning by the prosecutor of one of the defense witnesses before the grand jury on this conversations with defense counsel, the trial court said: "Well, that's pretty gross. That's pretty gross; improper use."

The difficulty with appellant's position here is twofold. In the first place, this court has held that in the case of even the most egregious prosecutorial misconduct, which the trial court

did not find here, the dismissal of an indictment in such a case must depend upon a showing of actual prejudice to the accused. Both the magistrate and the trial court concluded that no such prejudice had been established here. While it is evident that defense counsel was thrown off balance somewhat by the late production of materials in possession of the prosecution, a careful reading of the record convinces us that no actual prejudice occurred. In the second place, there can be no partial relief granted to the appellant by way of the grant of a new trial. This results from the fact that upon the express invitation of the trial court to make such a motion, the defendant declined to do so, standing firmly on his alleged right to have the indictment dismissed.

III. GRAND JURY TESTIMONY OF WITNESS FERNANDEZ

The appellant complains bitterly of the failure of the trial court to require the United States to produce the grand jury testimony of its principal witness Fernandez. The demand for this testimony created a real "tempest in a teapot." The government initially responded that it had no record of Fernandez having testitied before the grand jury. It stated that it had no recorded testimony of Fernandez. However, it was later discovered that the witness had testified before the grand jury but the government reported that it was unable to find a transcript of his testimony.

[2] In its brief before us, the government blandly takes the position that "the *Jencks* Act does not require the government to produce that which it does not have in its possession," citing *United States v. Trevino*, 556 F.2d 1265, 1271 (5th Cir.

1977). The argument that when grand jury proceedings have been recorded but not transcribed, the government does not have them in its possession is nothing short of ridiculous. Certainly, if an FBI agent should testify as a witness against a defendant in a criminal prosecution, and the latter demands any written statements made by him relating "to the subject matter of the testimony" the government can't refuse merely because the FBI's statement is in shorthand and has not been transposed in a manner to be read by others. That is precisely the situation which faced the court here and the court recognized it and ordered the transcript to be prepared and submitted to it. This, however, was not accomplished until after the trial was completed.

[3] The appellant does not argue that the failure of the trial court to examine it before the end of the trial would automatically entitle him to a new trial. He states:

> [I]f after an *in camera* examination, there is an arguable factual basis for concluding that some or all of said grand jury testimony related to the subject matter as to which the witness testified at the trial, then this Court should make available to all counsel such portions of that grand jury testimony, and the cause should be remanded to the District Court to conduct such further adversary hearing as appropriate, *United States v. Rivero*, 532 F.2d 450 (5th Cir. 1977).

Appellant's Brief, p.28. While the court followed that procedure in *Rivero*, it was necessary to do so because the transcript

of the grand jury testimony in that case was not before this Court. Here, however, the sealed document has now been opened and we have carefully compared it with Agent Fernandez' testimony at the trial and find that there is no "substantial inconsistency, contradiction or variation" in the testimony given on the two occasions. A copy of this unsealed testimony was also furnished to the appellant. We conclude that no prejudice has resulted to the defendant as a result of the trial court's failure to require the production of the document during the trial.

IV. THE INAUDIBLE TAPE

[4] During the course of the trial the government's principal witness Fernandez testitied to having recorded a conversation as to which he also testitied from the witness stand. The recorded tapes had been submitted to defense counsel long before trial. Some objections were made on the ground that part of the tapes were unintelligible. Thereafter, the government furnished defense counsel with a transcript which it reported had been prepared by Fernandez. Then at the trial, there was some discussion as to how much of the tapes were intelligible, whereupon the judge stated that he would listen to the transcript as it was played, that he would distribute the transcript to the jury but instruct them not to get ahead of what they might hear. The court stated that it would stop the recording and withdraw the transcripts in the event the tape was unintelligible. The court then expressly asked whether there was objection to the publishing of the tape and counsel responded: "No, Sir." Very shortly thereafter, it appeared that the recording was unintelligible and the trial court withdrew all of the transcripts. It then permitted the toral recording to

be completed but the quality was so poor that the court instructed the jury to disregard the tapes completely. We conclude that no prejudicial error resulted from the manner of handling this tape or the transcripts.

V. CHALLENGE TO THE JURY PANEL

[5] Two months following the conclusion of his trial, the appellant filed a motion to dismiss the indictment for failure to comply with the Jury Selection Act, Title 28 U.S.C. § 1863(b)(2)(4) and for failure to comply with Jury Selection and Service Act of 1960 as amended. The basis of the Complaint is that the jury before which he was tried was selected from names drawn from a 1973 master jury wheel. Under the statute, the Miami qualified wheel was refilled about two and one half months late, on September 9, 1977 whereas the jury in this case was empaneled on August 22, 1977.

The fatal difficulty with this contention is that the statute provides that:

> In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, *whichever is earlier,* the defendant may move to dismiss the indictment or stay the proceedings against him, etc. (emphasis added)

Subsection (e) provides:

> The procedures prescribed by this section shall be the

exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge on the ground that such jury was not selected in conformity with the provisions of this title.

This Court has applied this standard in all its strictness in *United States v. DeAlba-Conrado*, 481 F.2d 1266 (5th Cir. 1973) and in *United States v. Kennedy*, 548 F.2d 608 (5th Cir. 1977). In the latter case, this Court said:

> The courts have strictly enforced both the timeliness and sworn statement requirements of § 1867. This court has refused to consider a statutory challenge raised after the empanelling of a jury. *See United States v. De Alba-Conrado*, 481 F.2d 1266 (5th Cir. 1973).
> 548 F.2d at 613.

VI. CONSECUTIVE SENTENCES

[6] Merlino was indicted under an indictment in two counts, the first of which charged that he did "knowingly intentionally possess with intent to distribute a controlled substance . . ." in violation of Title 21, U.S.C. § 841(a)(1) and the second of which charged that he "did knowingly and intentionally distribute a controlled substance . . ." in violation of Title 21, U.S.C. 841(a)(1).

The relevant Code section provides:

841. Prohibited Acts - Unlawful Acts.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to . . . distribute . . or possess with intent to . . . distribute . . . a controlled substance . . ..

Thus, the indictment charges two separate crimes arising under a single subparagraph of § 841(a). It is also clear from the evidence in this case that Merlino's conviction of the two counts results form a single act, that is, the sale of approximately one-half pound of cocaine by Merlino to Fernandez, the DEA agent.

The determination of this case has been withheld pending the dicision of the Court en banc of *U.S.A. v. Hernandez*, 580 F.2d 188 (1978). *Hernandez* has now been decided by the en banc Court, *U.S.A. v. Hernandez*, 591 F.2d 1019 (1979). It controls the decision here. The evidence of the sale was relied upon to prove both Merlino's constructive possession of the cocaine and his intention to distribute it. Both sentences cannot stand.

VII. CONCLUSION

We have given careful consideration to the appellant's criticism of the sentencing procedure and the other matters complained of and find that they do not merit discussion.

We affirm the judgment of conviction but remand the case to the trial court for sentencing.

AFFIRMED and REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5708

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANK J. MERLINO,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING
(July 30, 1979)

Filed: July 30, 1979

Before BROWN, Chief Judge, TUTTLE and THORNBERRY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in

the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ JOHN R. BROWN
CHIEF JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5708

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANK J. MERLINO,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

Filed: August 20, 1979

O R D E R:

IT IS ORDERED that appellant's motion for leave to file second petition for rehearing and leave to file rehearing en banc is GRANTED.

/s/ JOHN R. BROWN
CHIEF JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

September 21, 1979

TO ALL PARTIES LISTED BELOW:

NO. 77-5708 - U.S.A. v. MERLINO

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By /s/ Sally Hayward
Deputy Clerk

cc: Mr. Richard M. Gale
Messrs. Michael A. Masin
Michael J. Rosen
Ms. Linda Collins Hertz

Supreme Court, U. S.
FILED
NOV 23 1979
JOSEPH F. SPANIOL, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-654

FRANK J. MERLINO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-654

FRANK J. MERLINO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

PROPRIETY OF SUPPLEMENT

One of the questions presented to the Court in the petition is based on an intracircuit conflict between the case, *sub judice*, and the decision of the Fifth Circuit in *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979). Subsequent to the filing of the petition for certiorari, the Fifth Circuit entered an opinion on rehearing in the *Hammond* case. The *Hammond* opinion on rehearing makes reference to this case. Further, the United States Court of Appeals for the Fifth Circuit through its Clerk notified the Clerk of this Court by letter as follows:

"The Court has been advised by the appellant that he will seek certiorari on the ground that the decision in this case is in conflict with another decision of this Court, No. 78-5179, *United States v. Hammond*. His petition for certiorari was filed in your Court on October 22, 1979.

"The Court has requested that we forward a copy of the opinion on rehearing in the *Hammond* case dated November 1, 1979 for whatever purpose it might serve your Court."

Question IV of the Petition for Writ of Certiorari reads as follows:

> "Where one panel of a circuit grants a new trial and another panel of the same circuit states it cannot grant a new trial when the defendant in each case declines an invitation to move for a mistrial but instead seeks dismissal of the indictment based on govermental misconduct (which constitutes a denial of Due Process or requires the Court to exercise its supervisory power) the Supreme Court should review based on the intracircuit conflict and the importance of the issues or remand for rehearing *En Banc* Pursuant to Rule 35, Federal Rules of Appellate Procedure."

In the first opinion in *Hammond* filed July 16, 1979, Circuit Judges Goldberg and Wisdom (in an opinion authored by Judge Goldberg) held that where there is governmental misconduct consisting of a FBI agent's statement to a witness to keep the witness from testifying, the defendant's Due Process right to present his witness is denied and the defendant is entitled to a new trial [notwithstanding defendant's refusal to accept a mistrial].

The dissenting opinion of Circuit Judge Vance reflects in *Hammond* I that the defendant objected to the granting of a mistrial and urged that the district judge erred by not dismissing the indictment based on governmental misconduct (598 F.2d at 1015). Judge Vance opined that rather than grant Hammond the new Trial to which he objected, the judgment should be affirmed. (Ibid)

In the case, *sub judice,* a panel consisting of Judges Brown, Tuttle and Thornberry held concerning petitioner's request that the Court exercise its supervisory capacity to dismiss the indictment (or, in the alternative to grant a new trial) as follows:

> "In this respect, the appellant is in the position of asking for a dismissal with no alternative of the grant of a new trial, because after substantially all of the occurrences of which he now complains, the trial court expressly placed upon the defendant a burden of deciding whether he

wished to move for a mistrial. The defendant elected not to do so, standing on his motion for a dismissal of the indictment.

* * * * *

"In the second place, there can be no partial relief granted to the appellant by way of the grant of a new trial. This results from the fact that upon the express invitation of the trial court to make such a motion, the defendant declined to do so, standing firmly on his alleged right to have the indictment dismissed [based on prosecutorial misconduct]."

Based on the direct conflict between the *Merlino* decision and *Hammond* I on the issue of whether the Court of Appeals may grant a new trial based upon governmental misconduct where the defendant seeks a dismissal of the indictment and elects not to move for a mistrial, the petitioner sought leave to file a second petition for rehearing and rehearing en banc in the Fifth Circuit. Leave was granted to file the second petition, but said petition was denied. (See Appendix C and D at pp. A-14, 15 in the Petition for Writ of Certiorari).

Subsequently, on November 1, 1979, the *Hammond* panel issued an opinion on a petition for rehearing. (Said opinion is set forth in the supplemental appendix, *infra*). In the second *Hammond* opinion or *Hammond II,* the panel

makes reference to the *Merlino* case and the effect of refusing to accept a proffered mistrial. In this regard the panel in *Hammond II* stated the following in a footnote:

"We recognize that, by refusing to accept a proffered mistrial, a criminal defendant may sometimes not be allowed to seek a new trial. *See, e. g., United States v. Merlino,* 595 F.2d 1016, 1018 (5th Cir. 1979). But in the exceptional circumstances of this case, as set forth above, and where prejudice to the defendant is clearly established, we do not believe such refusal should be an absolute bar. Furthermore, Hammond did not directly seek a new trial in this appeal; rather, he sought dismissal of the indictment. As explained below, we here offer him the opportunity to take a new trial through exercise of our supervisory power."

This attempt by the *Hammond* II court to distinguish the instant case by citing it for the principle that by refusing to accept a proffered mistrial a criminal defendant *may sometimes not be allowed to seek a new trial* emphasizes the intracircuit conflict. For the panel in Merlino's case expressly held:

". . . the appellant is in the position of asking (595 F.2d at 1017)
for a dismissal *with no alternative* of the grant
of a new trial . . ." (Emphasis added)

The Court in Merlino's case re-emphasized that a new trial can not be had where an invitation to move for a mistrial is declined as seen from the following statement in *Merlino*:[1]

> "In the second case *there can be no partial relief* granted the appellant by way of the grant of a new trial" (Emphasis added) (595 F.2d 1018)

From the foregoing, it is readily apparent that the instant case collides with *Hammond* I and *Hammond* II, and this Court should decide the important question of Federal law, not as yet settled by the Court, as to whether a defendant must move for a mistrial where prosecutorial misconduct pollutes the judicial proceedings in order to be entitled to a new and fair trial.

It should be noted that in *Hammond* I, as a result of the governmental misconduct, a new trial was granted based on due process violations. In *Hammond* II as a result of governmental misconduct, a new trial was granted under the Court's supervisory powers.

Adverting to Questions I and II of the Petition, this Court is urged to exercise its supervisory powers to purge the omnipresence of prosecutorial misconduct and also to grant review

---

1. The *Hammond* panel attempts to distinguish *Merlino* by rewriting the holding on this point of law. This is in derogation of the rule that each panel of an appellant court is not free to reconsider the legal rules in a particular situation every time that problem recurs. *United States v. Hernandez*, 580 F.2d 188, 191 (5th Cir. 1978).

based on due process violations as the integrity of the judicial system will not tolerate the perversion of justice by government prosecutors misusing a grand jury and lying to cover up this misconduct.

CONCLUSION

This Court should issue a writ of certiorari to review the judgment and opinion of the Fifth Circuit or, in the alternative, remand the case for an en banc hearing to compel the Fifth Circuit to comply with Rule 35 of the Federal Rules of Appellate Procedure in order that the Circuit maintain uniformity of its decisions.

Respectfully submitted,

Richard M. Gale
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19 West Flagler Street
Miami, Florida 33130

Attorney for Petitioner

SUPPLEMENTAL APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Larry HAMMOND, a/k/a Larry Hoover, Defendant-Appellant.

No. 78-5179

United States Court of Appeals,
Fifth Circuit.

Nov. 1, 1979.

After defendant's conviction in the United States District Court for the Southern District of Florida at Miami, Wm. M. Hoeveler, J., was reversed in a panel opinion, 598 F.2d 1008, on the ground that the Government's intimidation of defendant's witnesses violated his constitutional right to present his own witnesses to establish a defense, the Government petitioned for rehearing. The Court of Appeals, Goldberg, Circuit Judge, held that defendant's counsel did not waive any claim of prejudice resulting from denial of defendant's constitutional rights by agreeing to allow a stipulation of the witnesses' testimony to be introduced in evidence.

Remanded.

Vance, Circuit Judge, dissented and filed opinion.

1. Criminal Law Key 899

Surrounding circumstances established that defendant's counsel did not waive any claim of prejudice to defendant resulting from Government's unconstitutional intimidation of his witnesses when he agreed to allow introduction in evidence of stipulation as to testimony of such witnesses.

2. Criminal Law Key 1189

Even though defendant, in appeal from his conviction, asked only that indictment be dismissed, Court of Appeals would exercise its supervisory power to protect integrity of judicial process from highly prejudicial government misconduct by according defendant option of new trial.

ON PETITION FOR REHEARING

Before WISDOM, GOLDBERG and VANCE, Circuit Judges.

GOLDBERG, Circuit Judge:

In the original panel opinion in this case, we found unanimously that the government's intimidation of Hammond's witnesses violated his "constitutional right to 'present his own witnesses to establish a defense' " and that, despite his counsel's agreement to stipulate to the testimony of those witnesses, pre-

judice resulted. A majority of the panel determined that the conviction should by reversed, although we refused to dismiss the indictment as Hammond requested.[1] *United States v. Hammond*, 598 F.2d 1008, 1012-15 (5th Cir. 1979.) On petition for rehearing, the Government argues for the first time that, by his counsel's agreement to allow the stipulation to be introduced, Hammond waived any claim of prejudice resulting from the denial of his constitutional rights.

[1] After a careful re-examination of the record, we do not find any such waiver. On the day after the government's actions - on the last day of the trial - Hammond's witnesses refused to testify further. The court, recessing the proceedings to its chambers, was uncertain how to deal with this grave and sudden situation and expressly indicated as much on the record. Hammond's counsel sought, without success, to have the indictment dismissed. When the court offered to grant a mistrial, Hammond's counsel refused - not because he thought there had been no prejudice to his client, but because a mistrial at that time would have been a futile gesture. He twice indicated to the court that Hammond now faced a situation where defense's main witness would testify no further because he feared retaliation by the government in unrelated proceedings pending against him in Colorado. A new trial at that time would have presented the same problems as the present trial. Finally, amid the confusion that reigned and at the urging of both the court and prosecutor, defense counsel agreed to allow the stipulation to be read to the jury.

---

1. Judge Vance dissented to that part of the opinion that ordered reversal of Hammond's conviction.

As the Supreme Court stated in *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 2055, 36 L.Ed.2d 854 (1973), "a strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial." In the landmark case of *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), the Supreme Court held that before a court can find a waiver of such rights all the facts and circumstances must show their voluntary and knowing abandonment. Furthermore " ' courts indulge every reasonable presumption against waiver of fundamental constitutional rights" and " 'do not presume acquiescence in the loss of fundamental rights.' " *Id.* (footnotes omitted); *see United States v. Shea,* 508 F.2d 82, 85 (5th Cir. 1975). The right to present one's own witnesses in such a fundamental constitutional right. *Hammond, supra,* 598 F.2d at 1012 n.3. The government's argument is in effect that Hammond waived this right by his counsel's agreement to allow the use of the stipulation.

Applying these standards to the extraordinary circumstances before us, we do not believe that Hammond is barred now from claiming a new trial. The problem in his trial arose in the first instance not by any default of his own, but from the affirmative misconduct of the government through the actions of Agent Peisner. It appears to us that the alternatives posed by the court amounted to a Hobson's choice: either there would be a mistrial, after which a new trial would present the same problems as the present trial, or the trial would proceed on the basis of the stipulation. While this latter course ap-

parently appeared to Hammond's counsel to be the lesser of the two evils, we have, as already pointed out, found it insufficient to protect Hammond's constitutional rights from the prejudice occasioned by the government's actions.[2] Upon consideration

---

2. We recognize the difficulties the court below faced in trying to resolve the problems occasioned by the governemnt's misconduct and believe it properly took an active role in coming forward with suggestions for their resolution. The Supreme Court has recognized the propriety of affirmative judicial involvement to protect a criminal defendant from such waiver of fundamental constitutional rights as is claimed to have occurred here. *See Von Moltke v. Gillies,* 332 U.S. 708, 68 S.Ct. 316, 323, 92 L.Ed 309 (1948) (waiver of right to counsel); *Cf. United States v. Garcia,* 517 F.2d 272, 277-8 (5th Cir. 1975) (waiver of conflict of interest of defense counsel). We believe, however, that here the court should have further resisted the "rush-to-justice" that produced the agreement to the stipulations which, in the particular circumstances, were inherently insufficient to protect Hammond's constitutional right. *See Hammond, supra,* 598 F.2d at 1014. While we do not attempt to enumerate all the measures a trial court might take in such circumstances to protect a defendant's rights,we believe that the court might, for instance, have ordered a continuance of the trial until it could further evaluate the nature of the threat to defendant's witnesses and have then tried in some manner to secure their testimony. The excessive haste of the "resolution" achieved is reflected in the stipulation itself which was, as we noted in the panel opinion, "so poorly worded that it undoubtedly confused the jury." *Hammond, supra,* 598 F.2d at 1014 & n.5.

of the totality of the circumstances and the controlling legal principles, we hold that Hammond's counsel's actions in agreeing to the stipulation did not waive Hammond's constitutional right.[3]

[2] We do, however, amend the panel's original order in one respect. Hammond on his appeal asked only that we dismiss the indictment. This we refused to do and instead reversed the case and remanded. Upon re-consideration, we recognize that Hammond must have the option of choosing to abide by the result of the original trial rather than face jeopardy again. We therefore modify our order and remand the case to the district court to allow defendant to obtain a new trial upon

---

3. We recognize that, by refusing to accept a proffered mistrial, a criminal defendant may sometimes not be allowed to seek a new trial. *See, e. g., United States v. Merlino*, 595 F.2d 1016, 1018 (5th Cir. 1979). But in the exceptional circumstances of this case as set forth above, and where prejudice to the defendant is clearly established, we do not believe such refusal should be an absolute bar. Furthermore, Hammond did not directly seek a new trial in this appeal; rather, he sought dismissal of the indictment. As explained below, we here offer him the opportunity to take a new trial through exercise of our supervisory powers.

Our disposition of the waiver question allows us to avoid the more difficult question of whether the agreement to the stipulation, made wholly by Hammond's counsel without Hammond's participation, can be considered binding on Hammond himself. *See Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 849, 9 L.Ed.2d 837 (1963); *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 568-9, 13 L.Ed.2d 408 (1965); *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 1248-9, 16 L.Ed.2d 314 (1966).

application to the district court within thirty days from the issuance of our order; otherwise the judgment must be affirmed. We take this action under our supervisory power to protect the integrity of the judicial process from such highly prejudicial governmental misconduct as occurred here [4] and in recognition of the fact that now, after the passage of almost two years from the time of the original trial, the causes for the refusal of the mistrial should be removed.

We therefore remand the case to the district court upon the terms set forth above.

REMANDED.

VANCE, Circuit Judge, dissenting.

---

4. The supervisory power of the appellate courts has long been established. As the Supreme Court stated in the case generally recognized for the canonization of that power, "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 613, 87 L.Ed. 819 (1942). *See also Thomas v. United States*, 368 F.2d 941, 946-7 (5th Cir. 1966). The supervisory power gives the appellate courts latitude to fashion remedies such as we have devised in the present case. *See United States v. Crow Dog*, 532 F.2d 1182, 1196-7 (8th Cir. 1976).

The majority's extended opinion answers one but not both of the concerns that prompted my original dissent.

The trial court committed no error. On appeal Hammond did not ask for a new trial. Our inviting him to accept an unrequested new trial is a judicial approach that I am unwilling to take. I would therefore affirm the conviction.

Supreme Court, U. S.
FILED
JAN 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-654

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK J. MERLINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

WADE S. LIVINGSTON
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Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-654

FRANK J. MERLINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 595 F. 2d 1016.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1979. A petition for rehearing was denied on September 21, 1979. The petition for a writ of certiorari was filed on October 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction should be reversed or the indictment dismissed because of prosecutorial misconduct.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing with intent to distribute and of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to consecutive terms of eight and five years' imprisonment, three years' special parole, and a fine of $15,000. The court of appeals affirmed petitioner's conviction but remanded to the trial court so that petitioner could be resentenced[1] (Pet. App. A-1 to A-11).

The evidence at trial showed that on December 17, 1975, Daniel Cacy was arrested in Jacksonville, Florida, by the Duval County Sheriff's Office. He was charged with possession and sale of a large amount of marijuana to an undercover officer (Tr. 165, 786, 801). Cacy had previously served prison terms for a number of offenses (Tr. 151-156, 285). In the hope of avoiding further incarceration, he offered to assist the Duval County Sheriff's Office by acting as a confidential informant (Tr. 156, 252-254, 335-339, 802-805).[2]

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[1]In accordance with *United States* v. *Hernandez*, 591 F. 2d 1019 (5th Cir. 1979) (en banc), the court held that consecutive sentences could not be imposed for distributing cocaine and for possessing cocaine with intent to distribute it where the two offenses were based on the same transaction.

[2]As a result of Cacy's assistance, the Duval County Sheriff's Office recovered a large quantity of marijuana, made several successful cases against gamblers and stolen art dealers, and seized a cocaine laboratory. In April 1976, the state charges against Cacy were dismissed. As reasons in support of the decision to drop the charges, the above enumerated assistance by Cacy was considered equally with the fact that Cacy had assisted "the Feds" in the instant case against petitioner. See Tr. 803-805, 812, 898-908.

On about January 12, 1976, Cacy traveled from Jacksonville to Miami, where an acquaintance introduced petitioner to Cacy as a person with whom he could negotiate for the sale of marijuana (Tr. 160, 164-167, 381-383, 397). Cacy became convinced that the petitioner would buy large amounts of marijuana (Tr. 166). Cacy went to Jacksonville and returned to Miami within a few days. He purchased four ounces of cocaine from petitioner in return for eight to ten pounds of marijuana and $2,400. Cacy hoped to sell petitioner 1,400 pounds of marijuana, but that transaction was not consummated (Tr. 167, 399-402).

After again returning to Jacksonville, Cacy informed the state authorities about his contacts with petitioner and told them that he might be able to arrange a large cocaine purchase from petitioner. The local officers introduced Cacy to Agents Ginley and Starrat of the Drug Enforcement Administration (DEA) in Jacksonville (Tr. 349-350, 353, 619, 777-778). On January 19, 1976, Cacy met Agent Fernandez at the DEA office in Jacksonville. In a recorded conversation, Cacy phoned petitioner from the DEA office, and they discussed Cacy's coming back to Miami for further negotiations (Tr. 157, 167, 533). That contact convinced Fernandez that there was a possibility, warranting further investigation, of learning about petitioner's illegal drug activities (Tr. 626-627).

Posing as a large supplier of marijuana from "out west," Fernandez was introduced to petitioner by Cacy on January 21, 1976, at Lums Restaurant in Miami (Tr. 197-198, 536, 543-544). They discussed a possible purchase of 50 pounds of cocaine at $14,000 or $15,000 per pound (Tr. 168, 198, 547-549). Fernandez told petitioner that he would have to rely on the latter's

expertise with regard to cocaine because Fernandez was more familiar with marijuana (Tr. 547). Petitioner described various types of cocaine, such as rock, crystal, and flake, and explained that it would be no problem for him to handle such a large amount, because it would come "right off the boat" (Tr. 548). Petitioner further advised Fernandez that he should purchase in pound quantities instead of kilograms in order to be assured of getting true weight (Tr. 548). It was agreed that petitioner would first deliver a sample in order to allow Fernandez to have the quality tested (Tr. 199, 203-204, 550). Fernandez agreed to purchase one-half pound for $8,000 (Tr. 200, 551). They then left the restaurant.

At about 8:00 p.m. that same day, Fernandez and Cacy again met petitioner at the restaurant and paid him the $8,000, with the understanding that the sample of cocaine would be delivered later that night (Tr. 202-204, 552-554, 602-603). Cacy and Fernandez returned to their motel to await further word from petitioner (Tr. 204-205, 604).

Surveillance agents followed petitioner while he went to several different locations and then returned to the same Lums Restaurant shortly after 11:00 p.m. (Tr. 736-739). At the restaurant, petitioner drove into the rear parking area and backed his car very close to a "Dempsey Dumpster" garbage bin, where he stopped momentarily; then he pulled into a parking place and entered the restaurant (Tr. 739). From the restaurant, petitioner called Cacy and Fernandez and requested that only one of them meet him at the restaurant (Tr. 205, 605-606).

Fernandez met petitioner at the restaurant about 11:30 p.m. (Tr. 210, 607). Petitioner pointed out the green "Dempsey Dumpster" to Fernandez and advised him

that the package of cocaine would be found behind the garbage bin, wrapped in a newspaper (Tr. 608). They left the restaurant together (Tr. 609, 740). Fernandez walked to the garbage bin, behind which he found the package inside the newspaper as described. Petitioner got into his car and used the headlights to illuminate the area while Fernandez looked for the package (Tr. 609-611, 740). The package contained 223.6 grams of cocaine of 42.7 per cent purity (Tr. 147, 608-611).

Cacy and Fernandez met with petitioner on several subsequent occasions but were unable to consummate the remainder of the cocaine deal. Petitioner was charged with possession and sale of the sample (Tr. 212-213, 612-614).

ARGUMENT

Petitioner contends that he is entitled to dismissal of the indictment or a new trial because of misconduct by the prosecutor.

1. At the close of the prosecutor's direct examination of Agent Fernandez, defense counsel requested any further Jencks Act material that had not already been furnished. The Assistant United States Attorney handling the case indicated that he believed that Agent Fernandez may have testified before the grand jury, but that he could not locate minutes of the grand jury session and that Fernandez did not recall having testified before the grand jury (Tr. 615). Fernandez testified on cross-examination that, although the case file showed that he had been subpoenaed to testify before the grand jury, he had no recollection of having done so (Tr. 617-618). The court subsequently ordered the Assistant U.S. Attorney to determine who had testified before the grand jury and to obtain a copy of the transcript if there was one (Tr. 682). The following day, the Assistant U.S. Attorney

confirmed that Fernandez had testified before the grand jury, but advised the court that his testimony had not been transcribed (Tr. 945-946). The court then ordered that the transcript be prepared (Tr. 948). See Pet. 9-10.

A transcript of the grand jury testimony was subsequently submitted to the court of appeals, which reviewed it and found that there was no "substantial inconsistency, contradiction or variation" between Fernandez's testimony at trial and his previous testimony before the grand jury (Pet. App. A-7 to A-8). Accordingly, the court of appeals found that petitioner was not prejudiced by the failure to have access to Fernandez's testimony at the time of trial (*id.* at A-8). Petitioner, who was also furnished with a copy of the transcript (*ibid.*), likewise has not pointed to any inconsistency between Fernandez's trial testimony and the grand jury testimony that he might have been able to exploit had the latter been available to him at trial. In the absence of any colorable showing of potential prejudice, petitioner is not entitled to relief.

2. Petitioner also complains (Pet. 8-9) of the failure of the prosecutor to furnish a report of a conversation between Fernandez and petitioner on January 23 or 24, 1976—several days after the transaction that formed the basis of the conviction in this case. The existence of such a report came to light near the beginning of defense counsel's cross-examination of Fernandez (Tr. 616-617).

Petitioner's counsel was furnished this report promptly after its existence became known to the prosecutor (Tr. 643-644). One paragraph of the report indicated that petitioner did not wish to talk about cocaine during his conversation with Fernandez, but instead wished to talk about lifting weights (Tr. 647). This paragraph, the district court concluded, if "[p]laced in the most

favorable light, * * * could be construed to be helpful to the defense" because it could be an indication that petitioner was not interested in getting into a narcotics deal with petitioner (*ibid.*). Accordingly, the court concluded (Tr. 647, 651-652) that the report was required to be furnished to petitioner under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and should have been furnished under the court's standing discovery order and, without specifying, "other orders of court."

Petitioner's counsel did in fact utilize the asserted *Brady* material in his cross-examination of Fernandez, eliciting from Fernandez testimony that petitioner wanted to talk about weight-lifting, not cocaine, following the initial transaction (Tr. 685-687, 691). Thus, even assuming that the timing of the production of the report was a failing of constitutional dimension (but see *United States* v. *Agurs*, 427 U.S. 97, 103, 112 n.20 (1976)), petitioner has demonstrated no prejudice from the incident. The court of appeals agreed (Pet. App. A-6), stating that "a careful reading of the record convinces us that no actual prejudice occurred" as a result of this or other asserted errors.

Moreover, the Assistant U.S. Attorney and Fernandez both testified that there was no intentional withholding of material (Tr. 656-657), and the trial court "detected nothing in this case that would indicate any willful type of conduct on the part of the prosecutor that would attempt to gain an advantage for the Government knowingly and intentionally to deprive the defendant of any of his rights" (Tr. 657). The court therefore concluded that the government had tried the case in "good faith" (Tr. 662-663).

3. Petitioner also argues (Pet. 12-13, 15-17) that dismissal of the indictment or a new trial is required

because of the prosecutor's questioning of a witness before the grand jury who had also been subpoenaed to testify at trial.

When petitioner learned that the informant, Cacy, had been arrested on state charges in Jacksonville, he employed an investigator to determine the circumstances surrounding those charges. The investigator learned that the state charges had been dismissed. Petitioner then subpoenaed persons familiar with the Jacksonville incidents to appear at trial (Tr. 431-432). Petitioner's counsel also informed the Assistant U.S. Attorney that the Jacksonville police were involved in a marijuana transaction with Cacy; the prosecutor then had these same witnesses subpoenaed to testify before a grand jury because of the indication of a possible violation of federal criminal law (Tr. 891-892).

One of the grand jury witnesses was asked by the attorney for the government if he had met with petitioner's counsel and, if so, what they had discussed. Petitioner argues (Pet. 6 n.2, 15, 17) that he was prejudiced by this questioning because the government was able to discover that counsel's principal interest was in learning the details of the arrangements for Cacy's cooperation with state officials on various matters (see note 2, *supra*). This, petitioner asserts, enabled the government to elicit at trial, on cross-examination of a former state prosecutor, that Cacy's cooperation with state officials played a role in dismissing the state charges against him in Jacksonville (Tr. 907-908). Petitioner argues that this questioning with respect to state charges "diluted" the impact of defense attacks on Cacy's motive for testifying as a prosecution witness, which the defense asserted was that the state charges pending in Jacksonville would be dropped in exchange for cooperation with DEA agents and favorable testimony in the *federal* proceedings.

Although we do not condone the use of compulsory process in order to question a witness about his conversations with defense counsel in a pending case,[3] there is no suggestion here that the grand jury inquiry was undertaken to ascertain the defense strategy in the present case. The inquiry was undertaken for the legitimate, independent reason of looking into allegations by petitioner's counsel of criminal activity involving the Jacksonville police force. Only one witness was asked about his conversations with defense counsel.

Moreover, it is clear that petitioner was not prejudiced as a result of this questioning. The entire cross-examination of the state prosecutor by the Assistant U.S. Attorney with respect to the importance of Cacy's cooperation with state and federal authorities was as follows (Tr. 908):

> Q. Now on a new subject again.
>
> * * * In dismissing the charges against Daniel Cacy, what relative weight would you give his cooperation with DEA; that is, was it of great importance that he cooperated with DEA?
>
> A. Yes sir, I believe it was.
>
> Q. Now, was his cooperation with the state authorities of the same importance?
>
> A. Yes sir.

---

[3]We would not necessarily regard it as improper, however, for an attorney for the government to ask a possible witness in a case about his conversations with defense counsel, so long as the compulsory process of the grand jury was not exploited for this purpose.

The former state prosecutor reiterated the fact that Cacy's cooperation with DEA had "great weight" in the decision to drop the state charges in his redirect examination by defense counsel (*ibid.*; see also Tr. 900-901). Thus, while the Assistant U.S. Attorney did elicit testimony that the state cooperation played a role in the dismissal of the state charges, he also emphasized, as had the defense, the importance of the cooperation with DEA.

It would hardly have been surprising to the prosecution that petitioner's counsel was interested in discovering the nature of the arrangements between Cacy, the Jacksonville police, and DEA agents in order to enable counsel effectively to impeach Cacy's credibility at trial. And, petitioner had effectively impeached Cacy at trial in any event. Cacy admitted that he lied to the police (Tr. 274-275), to petitioner (Tr. 395), and to his mother (Tr. 372). Thus, the district court stated to petitioner's counsel (Tr. 436):

> You have elicited from him [Cacy] the absolutely devastating impeachment of his credibility, so that * * * I don't know how much more you could do. Once you destroy and buy the credibility of a witness * * * as effectively as you have done * * * I don't know how the defendant is prejudiced.

Under these circumstances, there can be no serious suggestion that petitioner was prejudiced as a result of the grand jury incident.

4. Petitioner also argues (Pet. 9) that the government improperly failed to inform him that Cacy had been led to believe that in return for his cooperation, the government would not prosecute him for transporting 1,400 pounds of marijuana to Miami (see page 3, *supra*)

and failed to disclose that the statement filed in connection with the dismissal of the state charges in Jacksonville mentioned that Cacy had assisted the "Feds" in a $700,000 cocaine buy as one of the bases on which the state charges were dropped (see note 2, *supra*). However, Cacy testified at trial that he believed he would not be prosecuted for transporting the 1,400 pounds of marijuana to Miami if he cooperated with law enforcement officials (Tr. 477-478). Moreover, the fact that the statement filed in connection with dismissal of the state charges referred to Cacy's cooperation with the "Feds" was brought out on direct examination of the former state prosecutor (Tr. 901), and Agent Fernandez testified at trial that he was aware that Cacy believed he would be benefited in connection with the state charges if he cooperated in the DEA investigation (Tr. 626). Because these matters were brought out at trial, there is no basis for any claim of constitutional error arising from suppression of exculpatory evidence.[4]

In sum, while we do not condone the carelessness of the prosecution in failing to make Agent Fernandez's grand jury testimony available to the defense at trial as required by the Jencks Act or the inappropriate grand jury questioning regarding conversations between a prospective witness and defense counsel, neither these

---

[4]Petitioner also argues (Pet. 8) that there was prosecutorial misconduct in what he labels as a misrepresentation by the government as to the content of certain tapes of conversations between Cacy and others. However, as the magistrate, the district court, and the court of appeals found (Pet. App. A-4 to A-5), the prosecutor had relied on representations made by others and did not intentionally misrepresent the contents of these tapes. In any event, those portions that contained conversations referring to petitioner were turned over to petitioner in advance of trial, and there was therefore no prejudice to petitioner.

incidents nor the others of which petitioner (with far less justification) complains resulted in any significant prejudice to his defense. Even where the prosecution knowingly employs perjured testimony or allows such testimony to go uncorrected—far more culpable conduct than is charged in this case—dismissal of the indictment is not an appropriate remedy (see, *e.g.*, *United States* v. *Acosta*, 526 F. 2d 670 (5th Cir. 1976)), and a new trial is awarded only upon a showing that there is some "reasonable likelihood" that the prosecutorial misconduct could have affected the judgment of the jury. *United States* v. *Agurs*, *supra*, 427 U.S. at 103; *Giglio* v. *United States*, 405 U.S. 150, 154-155 (1972). Petitioner has not even satisfied this most generous of standards.[5]

[5]Petitioner also asserts (Pet. 19-20) that the court of appeals erred in holding that he waived his right to object to the errors assigned when he declined to move for a mistrial after the district court had invited him to do so (see Pet. App. A-6). This holding, he asserts (Pet. 19-20; Supp. Br. 3-7), is in conflict with the Fifth Circuit's decision in *United States* v. *Hammond*, 598 F. 2d 1008, 1012-1015 (5th Cir. 1979), in which the court held that the appellant was entitled to a new trial notwithstanding his decision not to move for a mistrial.

However, in the instant case, the court of appeals' observation that petitioner had not moved for a mistrial was an alternative holding. The court also held that there was no actual prejudice to petitioner, which, as the opinion makes clear (Pet. App. A-6), alone sufficed to support affirmance of his conviction.

Moreover, the two decisions are not in conflict. The *Hammond* panel, on rehearing, expressly relied on the exceptional facts of that case (Supp. Br. App. A-4, A-6 n.3) and the fact that prejudice to the appellant was "clearly established" (*id.* at A-6 n.3) in distinguishing the present case and reversing for a new trial. In any event, an intra-circuit conflict is not ordinarily a basis for review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1980

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in the

Supreme Court

of the

United States

OCTOBER TERM, 1979

NO. 79-654

FRANK J. MERLINO,

Petitioner,

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Respondent.

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO THE GRANTING OF CERTIORARI

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ARGUMENT

Petitioner will refrain from repeating any matter set forth in his petition for writ of certiorari and his

supplemental brief to petition for writ of certiorari. Petitioner's reply brief will contain material addressed to the arguments first raised in the government's opposition brief.

Gross Improper Use of the Grand Jury

1. The government concedes that it does not condone the use of compulsory process in order to question a witness about his conversations with defense counsel in a pending case (Gov't Br. 9, 11, 12). Notwithstanding, the government states that there is no suggestion here that the grand jury inquiry was undertaken to ascertain the defense strategy in the present case.

Petitioner will not repeat his argument contained in the questions presented in his petition as to the blatant misuse of a post-indictment grand jury to discover defense stratagem and to prepare for trial.

The boldness of the prosecutor in denying the government's misuse of the post-indictment grand jury for discovery purposes is clearly seen in the following proceedings at the hearing of June 13, 1977:

> "THE COURT: Did you not inquire of a witness [under Grand Jury subpoena] whether or not he had inquired of Mr. Masin [defense counsel] and what the nature of the conversation was?
>
> "MR. PAVE: That is a matter of record.
>
> "THE COURT: That was not discovery?

> "MR. PAVE: That was not discovery in that I did not get anything back. I can certainly talk to a police officer witness whether it be subpoena or derivative.
>
> "THE COURT: About his conversations with defense counsel in a case presently pending?
>
> "MR. PAVE: I think if the witness chooses not to answer he can." (2 SR 17, 18).[1]

It is almost pathetic that a member of the Solicitor General's staff can state to this Court that eliciting answers from a grand jury witness as to what the witness discussed with defense counsel does not result in ascertaining defense strategy (Gov't. Br. 9).

The Solicitor General has traveled a long road in a descending path since a case like *Mesarosh v. United States*, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956) where the Solicitor General candidly conceded that its chief witness had perjured himself in other cases.

Petitioner has accused the prosecutor with making false representations to the trial court that the post-indictment grand jury was not used for any discovery and that no *Brady* material existed. Petitioner has used exceptionally strong but appropriate language that justice has been perverted by the prosecutor's misuse of the grand jury and "lied to cover up this misconduct". The Solicitor General of the United States never even replied to these serious charges. Instead, the Solicitor

[1]Reference to the second supplement to the record-on-appeal will be by the use of the symbol "2 SR".

General attempted to avoid the charges and confuse this Court by stating the following in a footnote:

> "Petitioner also argues (Pet. 8) that there was prosecutorial misconduct in what he labels as a misrepresentation by the government as to the content of certain tapes of conversations between Cacy and others. However, as the magistrate, the district court, and the court of appeals found (Pet.App. A-4 to A-5), the prosecutor had relied on representations made by others and did not intentionally misrepresent the contents of these tapes. In any event, those portions that contained conversations referring to petitioner were turned over to petitioner in advance of trial, and there was therefore no prejudice to petitioner." (Gov't Br. 11)

This footnote concerning the Magistrate's finding that the prosecutor relied on patently false statements that there was no information favorable to the petitioner concerning certain *in camera* material but that the prosecutor did not himself thwart the process of the Court was made by the Magistrate on *April 15, 1977,* at an evidentiary hearing (SR 115).[2]

The magistrate's finding on *June 13, 1977,* that the prosecutor made "repeated representations to the Court that have been false in this case . . ." refers not to the

[2]Reference to the first supplement to the record-on-appeal will be by the use of the symbol "SR".

prosecutor's reliance on others but refers to the false representations knowingly made by the prosecutor (2 SR 21).

This finding of the Magistrate that the prosecutor lied to the trial court was based on the prosecutor's misrepresentations concerning matters of which he had personal knowledge. During a hearing before the District Judge on January 28, 1977, it was revealed that the government had subpoenaed many of the same persons that had been subpoenaed by the defendant to appear before a Federal grand jury on the morning of January 28, 1977 (R 149, 150).[3] On the *same day* the prosecutor deliberately misrepresented to the District Judge and employed deceptive tactics concerning the government's purpose in using the (post-indictment) grand jury and the information gained by the government from the witness' testimony.

The misrepresentations are as follows:

1. The prosecutor told the District Judge that the grand jury was not used for any discovery (R 155-156).

2. The grand jury was called to determine whether there was any wrongdoing in the police officers' handling of the case and whether there was any further *Brady* material that should be furnished to defense counsel (R 155).

Both the Magistrate and the District Judge *found* that the government improperly used the grand jury to

[3]Reference to the record-on-appeal will be by the use of the symbol "R".

discover testimony of witnesses subpoenaed by the defendant and *Brady* material was revealed which should have been furnished to the defendant (R 284, 294-296). The District Judge found that the grand jury was improperly used to prepare an indictment for trial (T 284). Both the District Judge and the Magistrate found that there was material in the transcripts of the grand jury containing *Brady* material that should have been furnished to the defendant (R 284, 294-296).

Quite simply, this Court must exercise its supervisory powers to indicate to all Federal prosecutors that the criminal justice system will not tolerate deliberate misrepresentations to a District Judge or to a United States Magistrate.[4]

This Court should accept jurisdiction in order to set minimum standards for the conduct of Federal prosecutors. These minimum standards should include, *inter alia,* that deliberate false representations to a trial court judge on a material matter will result in the grant of a new trial or the dismissal of an indictment depending on the flagrancy of the prosecutorial perfidy.

This Court must set a minimum standard for federal prosecutors which prohibits use of a post-indictment grand jury to subpoena witnesses to prepare the government's case for trial.

[4]It is perplexing to understand from all of the foregoing how the trial judge could make the statement half-way through the trial that the government had tried the case in good faith and that the government did not knowingly and intentionally deprive the defendant of any of his rights (T 656, 657, 662, 663).

Although our system of law may be the best in civilized society, it has its inherent defects for it is ministered through men. The frailties of men are reflected so clearly in this case which frailties resulted in the abuses perpetrated by the prosecutor that only this Court can correct.

Prosecutorial misconduct is so commonplace in regard to the oft-repeated suppression of *Brady, Giglio* and Jencks materials that it will continue unabated unless this Court exercises its role to supervise Federal courts. Thus minimum standards must be set to require prosecutors to comply with the well-established rules relating to the production of *Brady, Giglio* and Jencks material.

Accordingly, the writ should be granted.

Suppression of the Jencks Material

2. As to the government's failure to make Agent Fernandez' grand jury testimony available to the defense at trial as required by the Jencks Act, the government states it does not condone such carelessness of the prosecution (Gov't Br. 11). The government concludes, however, that the petitioner was not prejudiced by not having access to Fernandez' testimony at the time of trial. According to the Solicitor General there was no prejudice for the following reason:

> "Petitioner, who was also furnished with a copy of the transcript (ibid), likewise has not pointed to any inconsistency between Fernandez's trial testimony and the grand jury

testimony that he might have been able to exploit had the latter been available to him at trial. In the absence of any colorable showing of potential prejudice, petitioner is not entitled to relief." (Gov't Br. 6).

To the contrary there is a substantial inconsistency between the grand jury testimony of Fernandez and the latter's trial testimony. Notwithstanding the Fifth Circuit's finding that a comparison of Agent Fernandez' testimony at trial and his grand jury testimony reveal no " 'substantial inconsistency, contradiction or variation' " in the testimony given on the two occasions, the Fifth Circuit panel at oral argument indicated differently. For Judge Thornberry noted that the grand jury testimony of Fernandez was more incriminating than the testimony of Fernandez before the jury.[5]

Adverting to Fernandez' grand jury testimony, he stated:

> "We again met at Lum's and he *[Merlino] had placed half a pound of cocaine wrapped in newspaper behind a Dempsey Dumpster* and that was about it." (Grand Jury Testimony of 4/1/76; pp. 4, 5). (Emphasis added).

[5]Inasmuch as Fernandez' testimony was apparently unimpeachable during the trial, the oportunity to show that Fernandez substantially colored his testimony before the grand jury (to obtain an indictment) would have had a significant impact on the jurors who deliberated for seven hours as will be shown, *infra*.

On the other hand, in regard to the critical issue of who placed the cocaine behind the Dempsey Dumpster, Fernandez at trial stated:

> " . . . he then told me—motioned over his shoulder and asked me if I saw a green garbage can.
>
> "I looked and there was a big square Dempsey Dumpster. I said 'Yeah, the Dempsey Dumpster'.
>
> "He replied, 'Yeah, Yeah', and then he told—he said 'it's behind the Dempsey Dumpster, in the newspaper."
>
> (T 608)[6]

Neither Fernandez nor any agent saw Merlino place any cocaine behind the Dempsey Dumpster (T 608, 739-743).

Without citing the pages at which the trial judge commended the excellence of Mr. Masin, petitioner's trial counsel, in his cross-examination of Cacy, it is patently evident that Mr. Masin would have been able to effectively impeach Fernandez by asking him whether he had told the grand jurors that Merlino had placed one-half pound of cocaine behind the Dempsey Dumpster.

[6]Reference to the transcript of the trial proceedings will be by the use of the symbol "T".

Masin could have shown this grand jury statement to be a boldface misrepresentation by Fernandez.[7]

Further, had the grand jury transcript been produced during trial when ordered by the trial judge, defense counsel could have seriously questioned Fernandez' ability of recall, as the latter testified at the beginning of his cross-examination that he did not even remember appearing before the Federal grand jury (T 617). Fernandez' faulty memory could have been properly capitalized upon for he testified further that even with a subpoena to appear before the grand jury, he could not remember appearing before the grand jury (T 617).

Suppression of *Brady* Material

3. The government contends that no actual prejudice occurred as a result of the prosecutor's failure to furnish a statement of a conversation between Fernandez and the petitioner clearly containing *Brady* material indicating that the petitioner did not want to talk about cocaine (Gov't Br. 6, 7). The government contends that no actual prejudice resulted and the Court of Appeals (Fifth Circuit) agrees in this contention. Id. at page 7.

Petitioner would respond that the blatant suppression of the *Brady* material denied him a fair opportunity to prepare an entrapment defense. During

[7]Defense counsel could have inquired of Agent Fernandez whether the misrepresentations before the grand jury that he (Merlino) placed the cocaine behind the dumpster was more likely to achieve the result of obtaining an indictment.

cross-examination of the case agent, Fernandez it was elicited by chance that he had made a certain report (T 642-644). Thereupon, a two-page report by Fernandez was examined by the District Judge. Upon examination of the report he declared it to be *Brady* material. The first page of this report was found by the District Judge to be helpful to the defense where special agent Fernandez attempted to get defendant into a narcotics deal and the defendant indicated that he was not interested (T 647).

Obviously, this evidence that the defendant desired not to be involved in a drug deal would constitute evidence supporting the defense of entrapment.

The defense of entrapment is still viable in the laws of the United States and is considered a complete defense when properly asserted. *Hampton v. United States,* 425 U.S. 484, 48 L.Ed.2d 113, 96 S.Ct. 1646 (1976); *United States v. Russell,* 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637.

It is submitted that the government knowingly and wilfully withheld this exculpatory evidence or was grossly negligent as evidenced by the prosecutor's inability to explain why the report was not provided to defense counsel (T 651, 652).

From a review of all the evidence in the case, the specific information in the report as well as the overwhelming amount of governmental misconduct, it can be seen.

1) That the report was clearly *Brady* material.

2) Had it been timely provided under the standing discovery order, a serious and well-founded entrapment defense could have been prepared and,

3) By withholding the information, the government denied the petitioner the opportunity to consider and prepare such a defense.

Clearly, the suppressed *Brady* material constituted a crucial, critical and highly significant piece of evidence which was directly material to the petitioner's guilt or innocence. As such, this act alone by the government, coming without explanation, has a serious bearing on the fundamental fairness of the trial.

Thus, it is apparent that the misconduct of the government resulted in prejudice to the petitioner, denying him Due Process of Law under the Fifth Amendment and the right to effective assistance of counsel under the Sixth Amendment.

Intracircuit Conflict

4. Concerning the intracircuit conflict between the case *sub judice* and *United States v. Hammond,* 598 F.2d 1008 (5th Cir. 1979), and the decision on petition for rehearing in *United States v. Hammond,* not as yet reported,[8] the issues involved in the intracircuit conflict are clearly set forth in the petition and supplemental brief. Petitioner responds to the government argument that an intracircuit conflict is not ordinarily the basis for

[8]The opinion on petition for rehearing is contained in the supplemental appendix in the supplemental brief to petition for writ of certiorari.

review by this Court, *Wisniewski v. United States,* 353 U.S. 901 (1957).

The alleged intracircuit conflict was of sufficient importance that the Fifth Circuit through its Clerk notified the Clerk of this Court of the Fifth Circuit's opinion on rehearing in the *Hammond* case.[9]

This Court has taken jurisdiction when the intracircuit conflict relates to a recurring and important issue or is accompanied by "widespread conflict among the circuits," *Commissioner v. Estate of Bosch,* 387 U.S. 456, 457, it may become one of the factors inducing the Court to grant certiorari. See, *e.g., John Hancock Ins. Co. v. Bartels,* 308 U.S. 180, 181 (certiorari granted because of intracircuit conflict and the importance of the question); *Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507, 508 (certiorari granted "because of this intracircuit conflict"); *Maggio v. Zeitz,* 333 U.S. 56, 59-60 (certiorari granted because of differing views within a circuit that was most frequently confronted with difficult bankruptcy problems); *Scarborough v. United States,* 431 U.S. 563, 567, n. 4 (certiorari granted because of "split among the Circuits," one Circuit being noted as having an intracircuit conflict).

A remand for an en banc hearing may also be appropriate in dealing with an intracircuit conflict. After granting a second petition for rehearing of an order denying certiorari, this Court remanded a criminal case to the Ninth Circuit with leave to apply for an en banc hearing before that court "[i]n view of the conflict of

[9]The contents of the Fifth Circuit's letter are set forth in the supplemental brief at page 2.

views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case," and in view of a recent Supreme Court decision in another case. *United States ex rel. Robinson v. Johnston,* 316 U.S. 649, 86 L.Ed. 1732.

CONCLUSION

This Court should issue a writ of certiorari to review the judgment and opinion of the Fifth Circuit or, in the alternative, remand the case for an en banc hearing to compel the Fifth Circuit to comply with Rule 35 of the Federal Rules of Appellate Procedure in order that the Circuit maintain uniformity of its decisions.

Respectfully submitted,

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